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Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1998

VICKY BRAWNER-AHLSTROM,

Petitioner,

v.

ROBERT J. HUSSON, GARY PON, and JAMES WALL,

Respondents.

On Petition For A Writ Of Certiorari To The Colorado Court Of Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether under *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993), an inference of unlawful gender discrimination arises once the claimant shows that the employer's allegedly non-discriminatory reason for discharge was pretextual and that similarly situated males were treated more favorably, or whether, as the Colorado Court of Appeals held below, the claimant must also produce either direct evidence of intentional discrimination or direct evidence that the employer's proffered reason was pretextual **and** that discrimination was the underlying purpose disguised by the pretext.

2. Whether the opinion of the Colorado Court of Appeals is in conflict with this Court's opinion in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993), because the lower court held that when an employer comes forward with a non-discriminatory explanation for discharge, the claimant must offer **additional** evidence to demonstrate pretext and discriminatory intent and cannot demonstrate both discriminatory intent and pretext with the same evidence she produced to demonstrate a *prima facie* case of discrimination.

3. Whether the petitioner's evidence that she was well-qualified for her job and had received exemplary performance ratings two months before discharge, combined with the fact that male workers involved in the same event were treated less harshly, is sufficient evidence of pretext to defeat summary judgment.

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PETITION FOR A WRIT OF CERTIORARI

Vicky Brawner-Ahlstrom respectfully petitions the Court to issue a writ of certiorari to review the judgment and opinion of the Colorado Court of Appeals issued on April 30, 1998.

OPINIONS BELOW

The opinion of the Colorado Court of Appeals is reported at 969 P.2d 738 (Colo.App. 1998) and is set out in Appendix A. A timely petition for rehearing was denied on June 25, 1998 (Appendix C), and on January 11, 1999, the Colorado Supreme Court, Martinez, J., dissenting, denied a petition for discretionary review. Its order denying review is set out in Appendix E. The judgment of the District Court for the City and County of Denver, upon which the appeal to the Colorado Court of Appeals was based, is set out in Appendix B.

JURISDICTION OF THE SUPREME COURT

The judgment and opinion of the Colorado Court of Appeals were issued on April 30, 1998, and on January 11, 1999, the Colorado Supreme Court denied a petition for discretionary review. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257. This petition is timely filed on Monday, April 12, 1999, which is the 90th day after the Colorado Supreme Court entered its order

denying review. Rule 13.1 of the United States Supreme Court.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED IN THIS CASE

42 U.S.C. § 1983 states,

> Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory, subjects, or caused to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Section 1 of the Fourteenth Amendment to the United States Constitution states, in relevant part,

> . . . [N]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor deny any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

After being fired from her job as mail room supervisor at the Colorado Compensation Insurance Authority

(the "CCIA"),[1] petitioner brought suit under 42 U.S.C. § 1983 against three male supervisors[2] for intentional gender discrimination. She alleged that she had been singled out for disparate treatment because she was female, and hence, denied equal protection of the law. *See, e.g., Davis v. Passman*, 442 U.S. 228 (1979) ("The equal protection component of the Due Process Clause [of the Fifth Amendment] thus confers on petitioner a federal constitutional right to be free from gender discrimination . . . ").

The District Court for the City and County of Denver granted respondents' motion for summary judgment and held that petitioner had not established a *prima facie* case of gender discrimination. The Colorado Court of Appeals affirmed on a different ground. It specifically rejected the district court's reasoning and found that petitioner had in fact established a *prima facie* case of intentional discrimination. Appendix A, pages 6-7; 969 P.2d at 742.

Although the court acknowledged that petitioner received exemplary performance ratings throughout the four years immediately preceding her discharge, and that

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[1] The Colorado Compensation Insurance Authority is a "person" liable for damages under 42 U.S.C . § 1983. *Simon v. State Compensation Insurance Authority*, 946 P.2d 1298 (Colo. 1997), *cert. denied* (1998). So, too, are its employees. *Pontarelli v. Stone*, 930 F.2d 104, 113 note 17 (1st Cir. 1991).

[2] Petitioner's direct supervisor was defendant James Wall, the CCIA's vice president of administration. Mr. Wall's supervisor was defendant Gary Pon, the CCIA's president-general manager. Defendant Robert Husson is the CCIA's vice-president for benefits and claims administration. These three men comprise the CCIA's management or executive committee.

there was a genuine issue of material fact about whether she was "qualified for her position when she was terminated and whether any adverse employment decisions were made despite such qualifications," Appendix A, page 6; 969 P.2d at 742, it refused to consider these facts as evidence of pretext or to allow an inference of discriminatory animus to arise from this pretext. Instead, it held that in order for petitioner to survive respondents' motion for summary judgment, she was required to provide either direct evidence of intentional discrimination or direct evidence of discriminatory intent in addition to making a prima facie case and showing pretext.

Ms. Brawner-Ahlstrom's performance was annually evaluated in a number of different performance categories in which she was given a numerical rating and placed in one of five different levels: (1) Does Not Meet Expectations, (2) Partially Meets Expectations, (3) Meets Expectations, (4) Exceeds Expectations, and (5) Distinguished.

In 1988, she was rated as exceeding expectations; in 1989, as distinguished; in 1990, as distinguished; in 1991, as distinguished; and in an evaluation by Mr. Wall dated November 30, 1992, and signed by Gary Pon the next day, she was rated as being in the mid-range for "exceeding expectations" with a rating of 310 in a rating range of 275-349. Over 350 was considered distinguished. None of her annual evaluations contained any negative comments.

In the November 30, 1992, evaluation, Mr. Wall noted that, "Vicky's management style is ideally suited for the

records and mail departments. She is able to deal effectively with a very high turnover and an exceptionally young, untrained work force." He also noted that she "communicates effectively, timely compliance with all reporting requirements, monitoring and controlling staff performance, maintaining staff morale, accessible to staff . . . "

Her performance in the Supervision category was given an excellent rating of 350. Her "Planning, Organizing and Coordinating" performance was rated as excellent with a score of 400, and had the accompanying comment that "Over 97 percent of all inbound mail is filed and routed within 24 hours. She has accomplished this in a new facility and while taking over inbound mail from Central Services. One hundred percent of outbound mail received by her staff is processed in 24 hours, and this is a remarkable improvement . . . " She also received a score of 400 for "Management," which placed her at the "Distinguished" level for that category.

In June of 1992, one of Ms. Brawner-Ahlstrom's employees opened a letter addressed to Robert Husson and attempted to determine which file it should go in. When the employee realized that it was a personal letter to Mr. Husson, she took it to her supervisor, who in turn gave it to Ms. Brawner-Ahlstrom. The letter was from Amy LeVelle, a nurse who had been employed by the CCIA until about February of 1992. It was apparent from the letter that Ms. LeVelle had been involved in a long term affair with Mr. Husson, which was prohibited by

CCIA policy.[3] At the time Ms. LeVelle was romantically involved with Mr. Husson, Mr. Husson was married to, and living with, someone else.

Ms. Brawner-Ahlstrom immediately took the letter to Mr. Wall, who said that if she liked working at the CCIA, she would keep quiet about it. Mr. Wall gave the letter to his friend Mr. Husson, and Mr. Husson told Mr. Pon.

In early 1993, just two months after giving Ms. Brawner-Ahlstrom an exemplary annual evaluation, Mr. Wall again threatened her and initiated an "investigation" into her performance. The investigator concluded that she had been derelict in her job performance, and she was removed from her job in the mail room shortly thereafter. In her response to summary judgment, Ms. Brawner-Ahlstrom provided evidence that the investigation was biased and improperly handled and served only to justify a decision to fire her which had been made before it began.

Although Mr. Pon was aware of Ms. Brawner-Ahlstrom's outstanding performance ratings from just a few months earlier, he approved without comment the disciplinary actions taken against her in the spring of 1993, as did Mr. Husson when the three of them discussed the matter at an executive meeting. Mr. Pon has never investigated the behavior of either Mr. Wall or Mr. Husson. Nor has he ever taken any disciplinary actions against either of them, even though he had reason to believe that Mr. Husson might have been involved in an

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[3] This letter is under seal pursuant to orders of all three lower courts.

affair with a CCIA employee and that Mr. Husson and Mr. Wall were punishing Ms. Brawner-Ahlstrom by forcing her out of the company because she knew of the affair.

Mr. Pon, Mr. Husson, and Mr. Wall are all white males who knew about Mr. Husson's affair with a CCIA employee and either tried to cover it up, took no action to discipline Mr. Husson, who brought his love life into the firm, and then punished or approved the punishment of a female who knew about the affair. Ms. Brawner-Ahlstrom was thus punished because of her involvement in a situation while three white males, who were involved in that situation at least as much as she was, and in Mr. Husson's case, far more, were not punished.

The trial court granted respondents' motion for summary judgment and held that:

> The elements of a *prima facie* case of sex discrimination are that the plaintiff is within the protected group, that the plaintiff was doing satisfactory work, that the plaintiff was discharged, and that the plaintiff's position was filled by a person not in the protected class. *Cone v. Longmont United Hospital Association*, 14 F.3d 526, 529, 529 (10th Cir. 1994).
>
> The plaintiff established issues of fact as to the first three elements of the *prima facie* case. Plaintiff failed to establish the final element of the *prima facie* case.
>
> The final element has been leniently applied. *Jones v. Western Geophysical Company of America*, 669 F.2d 280 (5th Cir. 1982), *Howard v. Roadway Express, Inc.*, 726 F.2d 1529 (11th Cir. 1984). In the present action, however, plaintiff's

> failure as to the final element emphasizes the shortcomings of her entire action. Plaintiff has failed to produce a scintilla of evidence that her sex played a role in her dismissal.
>
> Plaintiff's only allegation bearing upon her sex relates to a disparate treatment claim. The crux of her argument hinges upon a characterization of defendant Wall as a similarly situated employee. Mr. Wall, however, was the plaintiff's supervisor.

(Appendix B, pages 10-11)

The court thus held that while there were genuine issues of material fact on three of what the trial judge felt were the four factual elements of a gender discrimination claim, no reasonable inference could be drawn from the depositions and affidavits that her mistreatment was gender-based. He did not address the pretext issue.

Although the Colorado Court of Appeals "disagree[d] with the trial court that plaintiff failed to establish all elements of a *prima facie* case of sex discrimination," Appendix A, pages 6-7; 969 P.2d at 742, it affirmed the grant of summary judgment on a different ground, i.e., because it felt Ms. Brawner-Ahlstrom failed to rebut respondents' evidence of a legitimate, non-discriminatory motive for discharge. It held that, "Defendants are entitled to summary judgment unless plaintiff produces either direct evidence of discrimination or evidence that defendants' proffered reason for the action was pretextual, with discrimination being the underlying purpose." *Id.*

The Court reached this conclusion even though it acknowledged that because of her excellent performance ratings shortly before discharge, the question of whether "plaintiff was qualified for her position when she was terminated and whether any adverse employment decisions were made despite such qualifications are disputed issues of fact." *Id.*

This holding means that in the lower court's view, evidence of pretext coupled with evidence of disparate treatment does not raise an inference of discriminatory animus sufficient to rebut the employer's alleged legitimate, non-discriminatory reason for discharge. It also means that discrimination claimants must produce evidence in addition to what they have offered to establish a *prima facie* case to create a factual issue about their pretext claim.

REASONS FOR ISSUING THE WRIT

The Colorado Court of Appeals held that evidence of pretext does not create an inference of discrimination and that pretext alone is insufficient to defeat summary judgment where the employer has offered a facially legitimate, non-discriminatory explanation for discharge. The court thus required gender discrimination plaintiffs to show either intentional discrimination or direct evidence of discriminatory intent **in addition to** making a *prima facie* case and showing pretext.

This additional requirement stands in sharp conflict with the less burdensome requirements established by this Court for defeating an employer's motion for summary judgment. *See, e.g., McDonnell Douglas Corporation v.*

Green, 411 U.S. 792 (1973), *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), and *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993).

In *McDonnell Douglas*, the Court held that the complainant has the initial burden of establishing a *prima facie* case of discrimination, and that this burden may be satisfied if he shows "(i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications." *Id.* at 802.

If the complainant satisfies his burden of establishing a *prima facie* case, the burden shifts to the employer to "articulate some legitimate, nondiscriminatory reason for the [complainant's] rejection." *Id.* Once the employer articulates such a reason, the complainant must then "be given a full and fair opportunity to demonstrate by competent evidence that the presumptively valid reasons for his rejection were in fact a coverup for a racially discriminatory decision." *Id.* at 805; *Burdine*, at 252-253. In showing pretext, it is especially relevant for the complainant to produce evidence that Caucasian persons committed acts which were similar to those of the complainant and were nevertheless rehired. *McDonnell Douglas* at 804. Furthermore, a complainant may show pretext either by "directly" proving "that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Burdine*, at 256.

This latter holding was reiterated in *St. Mary's Honor Center*: "[T]he factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the *prima facie* case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will permit the trier of fact to infer the ultimate fact of intentional discrimination, and . . . '[n]o additional proof of discrimination is required.' " *Id.* at 511.

It has been echoed by all eleven federal circuit courts of appeal. *See, e.g., Randall v. City of Aurora*, 69 F.3d 441, 451 (10th Cir. 1995) ("A showing of pretext is evidence which allows a jury to infer discriminatory intent."); *Conner v. Schnuck Markets, Inc.*, 121 F.3d 1390, 1397, note 6 (10th Cir. 1997) ("A plaintiff must produce either direct evidence of discrimination **or** evidence that the defendant's proffered reason was pretextual in addition to establishing a *prima facie* case in order to survive summary judgment.") (emphasis added); *Smith v. Stratus Computer, Inc.*, 40 F.3d 11, 16 (1st Cir. 1994), *cert. denied*, 514 U.S. 1108 (1995); *Holt v. KMI-Continental, Inc.*, 95 F.3d 123, 129 (2d Cir. 1996), *cert. denied*, 117 S.Ct. 1819 (1997); *Fuentes v. Perskie*, 32 F.3d 759, 762 (3d Cir. 1994); *Evans v. Technologies Applications & Service Company*, 80 F.3d 954, 960 (4th Cir. 1996); *Bodenheimer v. PPG Industries, Inc.*, 5 F.3d 955, 958 (5th Cir. 1993); *Boyd v. Harding Academy of Memphis, Inc.*, 88 F.3d 410, 414-15 (6th Cir. 1996); *Anderson v. Baxter Healthcare Corporation*, 13 F.3d 1120, 1124-26 (7th Cir. 1994); *Thomas v. Runyon*, 108 F.3d 957, 960-61 (8th Cir. 1997); *Wallis v. J.R. Simplot Company*, 26 F.3d 885, 890-91

(9th Cir. 1994); *Combs v. Plantation Patterns*, 106 F.3d 1519, 1543 (11th Cir. 1997).

The opinion of the Colorado Court of Appeals is thus in stark conflict with the opinions of this Court in *McDonnell Douglas*, *Burdine*, and *St. Mary's Honor Center* and with the opinions of all eleven federal circuits.

CONCLUSION

The Colorado Court of Appeals has imposed a new and substantial burden on discrimination claimants faced with an employer's motion for summary judgment based upon a facially legitimate, non-discriminatory reason for the employment action. Certiorari should be granted because that burden has not been imposed, and indeed, has been specifically rejected, by this Court and by all eleven federal circuits. Certiorari and reversal will insure that state courts in Colorado will apply federal anti-discrimination law in a manner consistent with the opinions of the courts of the United States.

Respectfully submitted,

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APPENDIX A

Opinion of the Colorado Court of Appeals,
969 P.2d 738 (Colo.App. 1998)

COLORADO COURT OF APPEALS April 30, 1998
No. 96CA1733

Vicky Brawner-Ahlstrom,

Plaintiff-Appellant,

v.

Robert J. Husson, Gary Pon, and James Wall,

Defendants-Appellees.

Appeal from the District Court of the
City and County of Denver
Honorable John W. Coughlin, Judge
No. 95CV2250

Division III JUDGMENT AFFIRMED
Opinion by JUDGE PLANK
Casebolt and Pierce*, JJ., concur

Steven U. Mullens, P.C., Steven U. Mullens, Colorado Springs, Colorado; James A. Carleo, Pueblo, Colorado; Wilcox & Ogden, P.C., Ralph Ogden, Denver, Colorado Springs, Colorado, for Plaintiff-Appellant

Overton & Feeley, P.C., Thomas J. Overton, Jane G. Ebisch, Denver, Colorado; Gale A. Norton, Attorney General, Martha Phillips Allbright, Chief Deputy Attorney General, Richard A. Westfall, Solicitor General, Thomas

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* Sitting by assignment of the Chief Justice under provisions of the Colo. Const. art. VI, Sec. 5(3), and §24-51-1105, C.R.S. 1997.

C. Sullivan, Assistant Attorney General, Denver, Colorado, for Defendants-Appellees

In this sex discrimination case, plaintiff, Vicky Brawner-Ahlstrom, appeals the summary judgment entered by the trial court in favor of defendants, Robert J. Husson, Gary Pon, and James Wall. We affirm.

Plaintiff was employed by the Colorado Compensation Insurance Authority (CCIA), where she supervised employees in the mail and records department. In June 1992, plaintiff informed her supervisor, defendant Wall, that a mailroom employee had opened by mistake a personal and confidential letter addressed to defendant Husson, vice president of CCIA's benefits and claims administration. Wall told Husson, who then told defendant Pon, Wall's supervisor and CCIA's president-general manager, about the incident.

Thereafter, rumors about the letter began to circulate within the CCIA. Plaintiff stated that defendants Wall and Husson began to treat her differently than they had in the past. In February 1993, Wall asked plaintiff if she had made a copy of the letter to Husson. From that inquiry, she inferred that she was considered to be responsible for the rumors.

In response to an unrelated complaint from a subordinate, an investigation concerning plaintiff was conducted, after which plaintiff was found to be derelict in her duties. She was relieved of her supervisory duties, placed on probation, and given ninety days in which to relocate to another position within the CCIA.

Thereafter, claiming emotional distress, plaintiff did not report for work. She filed a workers' compensation

claim which is not at issue in this appeal. Plaintiff was terminated in May 1993 for job abandonment.

In May 1995, plaintiff filed a complaint, pursuant to 42 U.S.C. §1983 (1994), in which she claimed that defendants, in their individual capacities and acting under color of state law, had violated her right to equal protection by discriminating against her on the basis of her gender.

Plaintiff alleged that defendants had assumed that she started rumors about the letter because she is a woman. Plaintiff claimed that defendants embarked upon a campaign to drive her from the workplace because of what she knew about the letter, that defendants arbitrarily terminated her employment for that reason, that neither Husson nor Wall was punished by Pon for their involvement in the situation, and that defendants' conduct constituted gender-based disparate treatment and discrimination which was constitutionally prohibited.

Finding that plaintiff had failed to establish all elements of a *prima facie* case of sex discrimination, the trial court granted defendants' motion for summary judgment. This appeal followed.

I.

Plaintiff contends that the trial court erred in granting summary judgment. We disagree.

A. Summary Judgment

Summary judgment is a drastic remedy that is warranted only on a clear showing that there is no genuine

issue as to any material fact and that the moving party is entitled to judgment as a matter of law. C.R.C.P. 56; *Greenberg v. Perkins*, 845 P.2d 530 (Colo. 1993).

The party moving for summary judgment bears the burden of establishing the lack of a triable factual issue, and if there are any doubts as to the existence of such an issue, they must be resolved against that party. *Greenberg v. Perkins, supra.*

The party opposing summary judgment is entitled to the benefit of all favorable inferences that may be drawn from the facts contained in the record. *Churchey v. Adolph Coors Co.*, 759 P.2d 1336 (Colo. 1988).

Appellate review of a judgment granting a motion for summary judgment is *de novo. Aspen Wilderness Workshop, Inc. v. Colorado Water Conservation Board*, 901 P.2d 1251 (Colo. 1995).

B. Prima Facie Case

The federal statute at issue, 42 U.S.C. §1983, creates a private right of action for damages and injunctive relief against state actors who deprive a person of rights, privileges, or immunities secured by the Constitution and laws. *Monroe v. Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961), overruled in part on other grounds, *Monell v. New York City Department of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 65 L.Ed.2d 611 (1978).

As a general rule, to state a claim of discrimination under §1983 in the context of employment, a plaintiff must show: (1) that plaintiff is a member of a protected class; (2) that plaintiff was qualified for the position at

issue; (3) that defendants made an adverse employment decision despite the plaintiff's qualifications; and (4) that the position in question was ultimately filled by a person not a member of the protected class. *See St. Mary's Honor Center v. Hicks,* 509 U.S. 502, 113 S.Ct. 2742, 125 L.Ed. 2d 407 (1993). *See also McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973) (outlining elements of *prima facie* test under Title VII of the Civil Rights Act of 1964); *Southard v. Texas Board of Criminal Justice,* 114 F.3d 539 (5th Cir. 1997) (applying the same *prima facie* test to discrimination claims under Title VII and §1983).

However, the burden of proving a *prima facie* case is not an onerous one. A plaintiff must show by a preponderance of the evidence that the adverse action was taken by an employer under circumstances which give rise to an inference of unlawful discrimination. Proof that a discharged employee was replaced by a person not a member of the same protected class is not the only way to create such an inference. *See Texas Department of Community Affairs v. Burdine,* 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981).

Thus, the concept of a *prima facie* case is a flexible standard that may be modified to relate to different factual situations. *Mohammed v. Callaway,* 698 F.2d 395 (10th Cir. 1983). For example, in the context of an age discrimination claim, replacement by a person outside the protected class is no longer deemed to be a proper element of the *prima facie* case. *See O'Connor v. Consolidated Coin Caterers Corp.,* 517 U.S. 308, 116 S.Ct. 1307, 134 L.Ed.2d 433 (1996).

Here, the record indicates that plaintiff is a member of a gender-based protected class who was discharged from a position for which she was once qualified. It is undisputed that plaintiff received positive annual job performance evaluations from 1988 to 1992, that her performance was rated as either distinguished or exceeding expectations, and that both Wall and Pon wrote positive comments about her job performance.

The record also contains evidence that plaintiff was not the only female employee aware of the letter to Husson, that the investigation into plaintiff's performance began as a result of a complaint by a female employee under her supervision, that the investigation revealed various instances of mismanagement, and that plaintiff was found to be derelict in her duties for reasons unrelated to the disclosure of the personal letter to Husson. Thus, whether plaintiff was qualified for her position when she was terminated and whether any adverse employment decisions were made despite such qualifications are disputed issues of fact.

Although the record contains undisputed evidence that plaintiff was replaced with a member of the same protected class, it has been held that such replacement could itself be "a pretextual device specifically designed to disguise an action of discrimination." *Howard v. Roadway Express, Inc.*, 726 F.2d 1529, 1532 (5th Cir. 1984). Thus, under the rule of *Roadway Express*, with which we agree, a *prima facie* case can be established notwithstanding replacement by a member of the same protected class.

Here, we disagree with the trial court that plaintiff failed to establish all elements of a *prima facie* case of sex

discrimination. However, because we may affirm a trial court's correct result, even if it employed incorrect reasoning, *see Biel v. Alcott*, 876 P.2d 60 (Colo. App. 1993), it is appropriate for us to continue with the burden shifting analysis. *See Cone v. Longmont United Hospital Ass'n*, 14 F.3d 526 (10th Cir. 1994).

C. Burden of Proof

The burden of proof is placed upon a plaintiff to establish a *prima facie* case of discrimination. If the plaintiff establishes such a case, a presumption then arises that the employer unlawfully discriminated against the plaintiff. This presumption places upon defendants the burden of producing an explanation to rebut the *prima facie* case, *i.e.*, the burden of producing evidence that the adverse employment actions were taken for a legitimate, nondiscriminatory reason. *St. Mary's Honor Center v. Hicks, supra.*

If defendants' reasons suffice to rebut the presumption of discrimination created by plaintiff's *prima facie* case, plaintiff must then show that defendants' reasons are a pretext for discrimination. In a summary judgment setting, the plaintiff must raise a genuine factual question as to whether defendants' reasons are pretextual. *Drake v. City of Fort Collins*, 927 F.2d 1156 (10th Cir. 1991).

In such case, the presumption previously raised by a plaintiff's proof of a *prima facie* case is rebutted and drops from the case. *St. Mary's Honor Center v. Hicks, supra.* Thus, the existence of a *prima facie* case does not necessarily preclude judgment as a matter of law against the plaintiff. *See Ingels v. Thiokol Corp.*, 42 F.3d 616 (10th Cir.

1994). Even if plaintiff established a *prima facie* case, defendants are entitled to summary judgment unless plaintiff produces either direct evidence of discrimination or evidence that defendants' proffered reason for the action was pretextual, with discrimination being the underlying purpose. *See Conner v. Schnuck Markets, Inc.*, 121 F.3d 1390 (10th Cir. 1997).

In the summary judgment context, plaintiff must present evidence sufficient for a factfinder reasonably to conclude that the decision to terminate her employment was driven by a discriminatory animus. A district court's grant of summary judgment to an employer will be upheld if the record is devoid of adequate direct or circumstantial evidence of the employer's discriminatory intent. *See Mulero-Rodriguez v. Ponte, Inc.*, 98 F.3d 670 (1st Cir. 1996).

Here, with their motion for summary judgment, defendants attached affidavits and exhibits which included a summary of the investigation into plaintiff's job performance, a letter to plaintiff requesting that she return to work, and a CCIA human resources document indicating that plaintiff was terminated for job abandonment. None of these documents indicates that plaintiff's demotion and termination were related to the disclosure of Husson's personal letter, nor do they in any way relate to her gender. The reasons articulated by defendants to explain plaintiff's employment termination are specific, reasonable, and sufficient to rebut the presumption of discrimination created by a *prima facie* case.

In response to the motion for summary judgment, plaintiff submitted her affidavit. She reiterated the facts

and allegations in her complaint, including her 1988-1992 job performance evaluations. However, she failed to produce evidence raising a genuine factual question as to whether the articulated reasons for her termination were pretextual and whether the true reasons were discriminatory. We agree with that part of the trial court's order which found that plaintiff "failed to produce a scintilla of evidence that her sex played a role in her dismissal." Absent such evidence, plaintiff failed to meet her burden of proof.

Thus, notwithstanding the existence of a *prima facie* case of sex discrimination, we conclude that plaintiff failed to show that defendants' stated nondiscriminatory reasons for her termination were a pretext. Based on the foregoing conclusion, we find it unnecessary to address the other arguments raised by the parties as to this issue.

We also find that plaintiff's appeal is not frivolous. Thus, defendants' request for costs and attorney fees is denied. *See Wood Bros. Homes, Inc. v. Howard*, 862 P.2d 925 (Colo. 1993).

The judgment is affirmed.

JUDGE CASEBOLT and JUDGE PIERCE concur.

APPENDIX B

Order Granting Summary Judgment, Entered by the District Court for the City and County of Denver, Case No. 95CV2250

DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO

Case No. 95 CV 2250 Courtroom 3

ORDER

VICKY BRAWNER-AHLSTROM,,

Plaintiff,

v.

ROBERT J. HUSSON, GARY PON, JAMES WALL, and ALEXIS RISK MANAGEMENT COMPANY,

Defendants.

THIS MATTER comes before the court on defendants', Husson, Pon, and Wall, motion for summary judgment.

C.R.C.P. 56 permits the entry of summary judgment where no genuine issue of material fact is necessary to the determination.

The elements of a prima facie case of sex discrimination are that the plaintiff is within the protected group, that the plaintiff was doing satisfactory work, that the plaintiff was discharged, and that the plaintiff's position was filled by a person not in the protected class. *Cone v. Longmount United Hospital Association,* 14 F.3d 516, 529 (10th Cir. 1994).

The plaintiff established issues of fact as to the first three elements of the prima facie case. Plaintiff failed to establish the final element of the prima facie case.

The final element has been leniently applied. *Jones v. Western Geophysical Company of America*, 669 F.2d 280 (5th Cir. 1982), *Howard v. Roadway Exp., Inc.*, 726 F.2d 1529 (11th Cir. 1984). In the present action, however, plaintiff's failure as to the final element emphasizes the shortcomings of her entire action. Plaintiff has failed to produce a scintilla of evidence that her sex played a role in her dismissal.

Plaintiff's only allegation bearing upon her sex relates to a disparate treatment claim. The crux of her argument hinges upon a characterization of defendant Wall as a similarly situated employee. Mr. Wall, however, was the plaintiff's supervisor.

The motion for summary judgment is GRANTED.

DATED this 28 day of Aug., 1996.

BY THE COURT:

/s/ J. W. Coughlin
John W. Coughlin
District Court Judge

cc: All Counsel

APPENDIX C

Order of the Colorado Court of Appeals Denying the Petition for Rehearing

THE COURT OF APPEALS OF THE
STATE OF COLORADO

Case Number 96CA1733

ORDER

VICKY BRAWNER-AHLSTROM V ROBERT J. HUSSON ET AL

Upon consideration of the Petition for Rehearing filed by the Plaintiff-Appellant herein, the Petition is hereby DENIED. It is ordered that issuance of the Mandate is stayed to and including July 27, 1998 provided that if a Petition for Writ of Certiorari is timely filed with the Supreme Court of the State of Colorado, the stay shall remain in effect until disposition of the cause by the Supreme Court.

BY THE COURT:

Plank, J.
Casebolt, J.
Pierce, J.

DATED: June 25, 1998

APPENDIX D

Mandate of the Colorado Court of Appeals

Appeal from the District Court of the City and County of Denver, State of Colorado, to the Colorado Court of Appeals. Opinion issued & judgment entered April 30, 1998, before Plank, Casebolt and Pierce, JJ.

COURT OF APPEALS, STATE OF COLORADO
2 East Fourteenth Avenue, Suite 300
Denver, Colorado 80203
(303) 837-3785

MANDATE

Court of Appeals No. 96CA1733
Trial Court No. 95CV2250

VICKY BRAWNER-AHLSTROM V ROBERT J. HUSSON, ET AL

This cause came to be heard on the record on appeal from the District Court of the City and County of Denver, State of Colorado, and was argued by counsel. On consideration thereof, it is ordered that the Judgment of said Court is AFFIRMED.

DATE: January 28, 1999

(SEAL)

PATRICK STANFORD,
Clerk of the Court

By: /s/ Cathleen Abeyta
Deputy Court Clerk

COURT OF APPEALS, STATE OF COLORADO
Certified to be a full, true and correct copy
Date: January 28, 1999
Clerk of Court of Appeals
By: Cathleen Abeyta
Deputy Clerk

APPENDIX E

Order of the Colorado Supreme Court Denying the Petition for Certiorari

SUPREME COURT, STATE OF COLORADO
CASE NO. 98SC405
CERTIORARI TO THE COLORADO COURT OF APPEALS, 96CA1733
DISTRICT COURT, CITY & COUNTY OF DENVER, 95CV2250

ORDER OF COURT

VICKY BRAWNER-AHLSTROM,

Petitioner,

v.

ROBERT J. HUSSON, GARY PON, and JAMES WALL,

Respondents.

Upon consideration of the Petition for Writ of Certiorari to the Colorado Court of Appeals, and after review of the record, briefs, and the judgment of said Court of Appeals,

IT IS THIS DAY ORDERED that the Petition for Writ of Certiorari shall be, and the same hereby is, DENIED.

BY THE COURT, EN BANC, JANUARY 11, 1999.
JUSTICE MARTINEZ would grant as to the following issues:

Whether an employer's motion for summary judgment in a gender discrimination case should be granted even though the plaintiff has made a *prima facie* case of discrimination and has offered evidence of pretext in response to employer's claim that the plaintiff was fired for legitimate, non-discriminatory reasons.

Whether an inference of unlawful discrimination arises once the plaintiff shows that the employer's allegedly non-discriminatory reason for discharge was pretextual and that similarly situated males were treated more favorably, or whether, as the court of appeals held, the plaintiff must also produce either direct evidence of discrimination or direct evidence that the employer's proferred reason was pretextual and that discrimination was the underlying purpose disguised by the pretext.

Whether the petitioner's evidence that she was qualified for the job and had received exemplary performance ratings two months before discharge, combined with the fact that male workers involved in the same event were treated less harshly, is sufficient evidence of pretext to defeat summary judgment.

In light of *Colorado Civil Rights Commission v. Big O Tires, Inc.*, 940 P.2d 397 (Colo. 1997) (rehearing denied), did the court of appeals err in suggesting that when the employer comes forward with a non-discriminatory intent and cannot demonstrate both discriminatory intent and pretext with the same evidence she produced to demonstrate a *prima facie* case of discrimination.

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Honorable John W.
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